

(1) The authority to make the determination authorized in FAR 16.504(c)(1)(ii)(D)(1)(iv) shall not be delegated below the level of the senior procurement executive.

(3) A copy of any determination made in accordance with FAR 16.504(c)(1)(ii)(D) shall be submitted to: Deputy Director, Defense Procurement (Contract Policy and International Contracting), OUSD (AT&L) DPAP (CPIC), 3060 Defense Pentagon, Washington, DC 20301-3060.

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## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Parts 225, 236, and 252

RIN 0750-AG16

#### Defense Federal Acquisition Regulation Supplement; Steel for Military Construction Projects (DFARS Case 2008-D038)

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Interim rule with request for comments.

**SUMMARY:** DoD has issued an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 108 of the Military Construction and Veterans Affairs Appropriations Act, 2009. Section 108 requires that American steel producers, fabricators, and manufacturers be given the opportunity to compete for contracts and subcontracts for the acquisition of steel for use in military construction projects or activities.

**DATES:** *Effective date:* January 15, 2009.

*Comment date:* Comments on the interim rule should be submitted in writing to the address shown below on or before March 16, 2009, to be considered in the formation of the final rule.

**ADDRESSES:** You may submit comments, identified by DFARS Case 2008-D038, using any of the following methods:

○ *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

○ *E-mail:* [dfars@osd.mil](mailto:dfars@osd.mil). Include DFARS Case 2008-D038 in the subject line of the message.

○ *Fax:* 703-602-7887.

○ *Mail:* Defense Acquisition Regulations System, Attn: Ms. Amy

Williams, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301-3062.

○ *Hand Delivery/Courier:* Defense Acquisition Regulations System, Crystal Square 4, Suite 200A, 241 18th Street, Arlington, VA 22202-3402.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided.

**FOR FURTHER INFORMATION CONTACT:** Ms. Amy Williams, 703-602-0328.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

Section 108 of the Military Construction and Veterans Affairs Appropriations Act, 2009 (Pub. L. 110-329, Division E) prohibits the use of funds appropriated in Title I of that Act for the procurement of steel for any military construction project or activity for which American steel producers, fabricators, or manufacturers have been denied the opportunity to compete. This interim rule adds DFARS policy and a contract clause to implement the statutory prohibition.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

##### B. Regulatory Flexibility Act

DoD has prepared an initial regulatory flexibility analysis consistent with 5 U.S.C. 603. A copy of the analysis may be obtained from the point of contact specified herein. The analysis is summarized as follows:

This interim rule implements Section 108 of the Military Construction and Veterans Affairs Appropriations Act, 2009. The objective of the rule is to ensure that American steel producers, fabricators, and manufacturers are given the opportunity to compete for contracts and subcontracts for the acquisition of steel for use in military construction projects and activities. Existing Buy American Act and Balance of Payments Program requirements, implemented in FAR Subpart 25.2 and DFARS Subpart 225.75 respectively, already provide for DoD acquisition of domestic construction materials, including steel. However, this DFARS rule will prohibit use of the exceptions to Buy American Act/Balance of Program requirements otherwise permitted by FAR/DFARS, with regard to the acquisition of steel, unless American steel producers, fabricators, and manufacturers are first provided the opportunity to compete. The rule is expected to benefit American steel producers, fabricators, and manufacturers by ensuring they are

provided an opportunity to compete for contracts and subcontracts for the acquisition of steel for use in military construction projects and activities.

DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2008-D038.

##### C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply, because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

##### D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to publish an interim rule prior to affording the public an opportunity to comment. This interim rule implements Section 108 of the Military Construction and Veterans Affairs Appropriations Act, 2009 (Pub. L. 110-329, Division E). Section 108 establishes a prohibition on the expenditure of funds for the procurement of steel for any military construction project or activity, unless American steel producers, fabricators, and manufacturers have been provided an opportunity to compete. Comments received in response to this interim rule will be considered in the formation of the final rule.

##### List of Subjects in 48 CFR Parts 225, 236, and 252

Government procurement.

**Michele P. Peterson,**

*Editor, Defense Acquisition Regulations System.*

■ Therefore, 48 CFR parts 225, 236, and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 225, 236, and 252 continues to read as follows:

**Authority:** 41 U.S.C. 421 and 48 CFR chapter 1.

##### PART 225—FOREIGN ACQUISITION

■ 2. Section 225.7014 is revised to read as follows:

##### 225.7014 Restrictions on military construction.

(a) For restriction on award of military construction contracts to be performed in the United States outlying areas in the Pacific and on Kwajalein Atoll, or in

countries bordering the Arabian Gulf, *see* 236.273(a).

(b) For restriction on acquisition of steel for use in military construction projects, *see* 236.274.

### PART 236—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

■ 3. Section 236.274 is added to read as follows:

#### 236.274 Restriction on acquisition of steel for use in military construction projects.

In accordance with section 108 of the Military Construction and Veterans Affairs Appropriations Act, 2009 (Pub. L. 110-329, Division E), do not acquire, or allow a contractor to acquire, steel for any construction project or activity for which American steel producers, fabricators, or manufacturers have been denied the opportunity to compete for such acquisition of steel.

■ 4. Section 236.570 is amended as follows:

- a. By redesignating paragraph (d) as paragraph (e); and
- b. By adding a new paragraph (d) to read as follows:

#### 236.570 Additional provisions and clauses.

\* \* \* \* \*

(d) Use the clause at 252.236-7013, Requirement for Competition Opportunity for American Steel Producers, Fabricators, and Manufacturers, in solicitations and contracts that—

(1) Use funds appropriated by Title I of the Military Construction and Veterans Affairs Appropriations Act, 2009 (Pub. L. 110-329, Division E); and

(2) May require the acquisition of steel as a construction material.

\* \* \* \* \*

### PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 5. Section 252.236-7013 is added to read as follows:

#### 252.236-7013 Requirement for competition opportunity for american steel producers, fabricators, and manufacturers.

As prescribed in 236.570(d), use the following clause:

#### REQUIREMENT FOR COMPETITION OPPORTUNITY FOR AMERICAN STEEL PRODUCERS, FABRICATORS, AND MANUFACTURERS (JAN 2009)

(a) *Definition.* *Construction material*, as used in this clause, means an article, material, or supply brought to the construction site by the Contractor or a subcontractor for incorporation into the building or work.

(b) The Contractor shall provide American steel producers, fabricators, and manufacturers the opportunity to compete when acquiring steel as a construction material (e.g., steel beams, rods, cables, plates).

(c) The Contractor shall insert the substance of this clause, including this paragraph (c), in any subcontract that involves the acquisition of steel as a construction material.

(End of clause)

■ 6. Section 252.244-7000 is amended as follows:

- a. By revising the clause date;
- b. By redesignating paragraphs (b) through (d) as paragraphs (c) through (e) respectively; and
- c. By adding a new paragraph (b) to read as follows:

#### 252.244-7000 Subcontracts for commercial items and commercial components (DOD contracts).

\* \* \* \* \*

#### SUBCONTRACTS FOR COMMERCIAL ITEMS AND COMMERCIAL COMPONENTS (DOD CONTRACTS) (JAN 2009)

\* \* \* \* \*

(b) 252.236-7013 Requirement for Competition Opportunity for American Steel Producers, Fabricators, and Manufacturers (Pub. L. 110-329, Division E, Section 108).

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## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Parts 225 and 252

RIN 0750-AF82

#### Defense Federal Acquisition Regulation Supplement; DoD Law of War Program (DFARS Case 2006-D035)

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to address requirements for DoD contractors to institute effective programs to prevent violations of the law of war by contractor personnel authorized to accompany U.S. Armed Forces deployed outside the United States.

**DATES:** *Effective Date:* January 15, 2009.

**FOR FURTHER INFORMATION CONTACT:** Ms. Angie Sawyer, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301-3062. Telephone 703-602-8384; facsimile 703-602-7887. Please cite DFARS Case 2006-D035.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

This final rule amends the clause at DFARS 252.225-7040, Contractor Personnel Authorized To Accompany U.S. Armed Forces Deployed Outside the United States, to address requirements for DoD contractors to institute effective programs to prevent law of war violations by contractor personnel. The rule requires that deploying contractor personnel receive appropriate law of war training, and that contractor personnel report any violations of the law of war to the appropriate authorities. The DFARS rule is consistent with the policy in DoD Directive 2311.01E, DoD Law of War Program, dated May 9, 2006.

DoD published a proposed rule at 73 FR 1853 on January 10, 2008. Four sources submitted comments on the proposed rule. A discussion of the comments is provided below.

1. *Comment:* The limitation on the use of Web-based basic law of war training is overly restrictive (i.e., must be approved by the contracting officer). The training should be available at any time for completion via a Web-based source to prevent delays in meeting training requirements.

*DoD Response:* Deployed contractor personnel must process through a deployment center, in accordance with paragraph (f) of the clause at DFARS 252.225-7040. DoD has provided training materials to all the pre-deployment training centers as the primary method of meeting basic training requirements. Web-based training is intended to substitute for live pre-deployment training only when determined to be appropriate by the contracting officer.

2. *Comment:* To ensure the availability of advanced training when needed, advanced training should be handled as an in-processing matter and should be provided at an in-theater/in-country central processing center for newly arriving contractor personnel.

*DoD Response:* Advanced training could be provided at in-processing, as long as the Judge Advocates or other Government counsel are involved. The DFARS rule has been amended to provide additional flexibility in meeting advanced law of war training requirements. However, government